IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 9TH OCTOBER 2007 / 17TH ASWINA 1929

RSA.No. 408 of 2005(F)

AS.135/2004 of PRINCIPAL SUB COURT,ALAPPUZHA
OS.950/2001 of ADDL.MUNSIFF COURT, ALAPPUZHA
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: APPELLANTS/APPELLANTS/DEFENDANTS:
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1. KUNJAMMA, W/O. MOHAN,
SRAMBICKAL HOUSE, ARATTUVAZHY P.O., ALAPPUZHA.

2. JANCY MOHAN, D/O. LATE MOHAN,
SRAMBICKAL HOUSE, ARATTUVAZHY P.O., ALAPPUZHA.

3. BODHI P.MOHAN, S/O. LATE MOHAN,
SRAMBICKAL HOUSE, ARATTUVAZHY P.O., ALAPPUZHA.

4. KABINI P.MOHAN, D/O. LATE MOHAN,
SRAMBICKAL HOUSE, ARATTUVAZHY P.O., ALAPPUZHA.

BY ADV. SRI.S.SANAL KUMAR

RESPONDENT: RESPONDENT/PLAINTIFF:

P.G.THANIA, D/O. GOMATHY AMMA,
SRAMBICKAL HOUSE, ARATTUVAZHY P.O., ALAPPUZHA.

BY ADV. SRI. R.AZAD BABU
SRI.JAYAN.C.DAS

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON 09/10/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

ORDER ON I.A.NO.488/06 IN R.S.A.NO.408/2005

9.10.2007 DISMISSED Sd/- M.Sasidharan Nambiar
Judge

/true copy/

P.S to Judge

M.SASIDHARAN NAMBIAR,J.

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R.S.A. NO. 408 OF 2005

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Dated this the 9th day of October, 2007

JUDGMENT

Defendants in O.S.No.950/2001 on the file of Munsiff Court, Alappuzha are the appellants. Plaintiff is the respondent. Respondent instituted the suit seeking a decree for mandatory injunction to vacate the plaint schedule building contending that plaint schedule property belongs absolutely to the respondent under Ext.A3 partition deed and appellants were jointly allotted B schedule property under Ext.A3 partition deed and they have no right over the plaint schedule property and respondent permitted appellants to reside in the building in the property free of rent, as respondent was residing outside the State due to their employment and after the husband of the respondent retired from service, due to cardiac surgery he was practically invalid and respondent is living with the meagre pension and she intends

to return to the native place and take up residence in the plaint schedule property and therefore licence granted to the appellants were revoked and they were directed to surrender vacant possession of the building, but they are not prepared for the same. Suit was instituted for a mandatory injunction directing appellants to surrender vacant possession of building. First appellant filed a separate written statement contending that she has no authority to bind the other appellants who were minors at the time of execution of the partition deed and the partition deed is not binding on the minor children and respondent did not pay the amount as directed under the partition deed and therefore first appellant is not liable to surrender vacant possession of the building and respondent is not entitled to the decree sought for. Appellants 2 to 4 in their joint written statement contended that Ext.A3 partition deed was not binding on them and the partition deed is void abinitio and first

appellant is not entitled to bind the other appellants, who were only minors at the time of executing the partition deed or to execute it on their behalf and first appellant is a lady without any education and respondent played fraud on her and created Ext.A3 and respondent is not entitled to the decree sought for.

2. Learned Munsiff on the evidence of PW1 and Exts.A1 to A5 rejected the case of the appellants that Ext.A3 partition deed is not binding on the appellants 2 to 4 holding that Section 8(2) of Hindu Minority and Guardianship Act has no application to a partition entered into by the co-sharers and under Ext.A3 properties were allotted to the appellants jointly and Ext.A3 is binding on the appellants. But it was found that even if Ext.A3 is voidable at the instance of the minor children, they should have filed a suit within three years of attaining majority and as they did not do so, they are not entitled to challenge the partition deed. Accepting the

evidence of PW1 learned Munsiff held that appellants are residing in the building as permitted by respondent and as that licence was terminated, respondent is entitled to the decree sought for. Holding that respondent did not establish that she is entitled to get mesne profits as claimed in the suit, a decree for mandatory injunction directing appellants to surrender vacant possession of the building was passed.

3. Appellants challenged the decree and judgment before Sub Court, Alappuzha in A.S.135/2004. Appeal was filed after the period of limitation, along with I.A.2322/2004 an application to condone the delay of two months and eight days in filing the appeal. Learned Sub Judge not satisfied with the grounds shown by the appellants to condone the delay, dismissed I.A.2322/04 and consequently dismissed the appeal as barred by time. This appeal is filed challenging the dismissal of the appeal contending that first appellate court should not have dismissed the

application to condone the delay in filing the appeal and should have found that Ext.A3 partition deed is not binding on appellants 2 to 4 who are minors at the time of execution of the partition deed.

4. As notice before admission was issued respondent appeared through a counsel.

5. Learned counsel appearing for appellants and respondent were heard.

6. The argument of learned counsel appearing for appellants is that first appellate court should not have denied an opportunity to the appellants to have a decision on merits and in the interest of justice delay of 68 days in filing the appeal should have been condoned and dismissal of the appeal is to be set aside. Learned counsel counsel also argued that when Ext.A3 partition deed was entered into, appellants 2 to 4 were minors and no permission of the court was taken for executing Ext.A3 partition deed and Ext.A3 partition deed was not for the benefit of appellants 2 to 4 the minor

children and therefore it should have been found that Ext.A3 is not binding on the appellants 2 to 4 and if so appellants being co-owners are entitled to continue their residence in the building and therefore the decree is unsustainable. Learned counsel also argued that even if Ext.A3 is taken as binding on all the appellants, it being the dwelling house of the appellants, which was allotted to respondent under Ext.A3, they have a right of residence in the dwelling house being the female children or and therefore a decree for mandatory injunction should not have been granted. Learned counsel appearing for respondent pointed out that for executing Ext.A3 partition deed, no permission of the court as provided under section 8 (2) of Hindu Minority and Guardianship Act, 1956 is necessary and as rightly found by courts below, Ext.A3 cannot be challenged for non-compliance of Section 8(2) of the Act. Learned counsel also argued that under Ext.A3, plaint schedule property was allotted to the share of respondent

and as respondent was residing outside the State, appellants were permitted to reside in the building and their residence in the building could only be as a licensee and as respondent had to return back to the native place after retirement of her husband, intimation given and inspite of termination of licence, appellants did not surrender vacant possession and therefore respondent is entitled to the decree for mandatory injunction granted by the trial court. It was further argued that there is no merit in the first appeal itself and in such circumstance, there is no necessity to remand the suit for fresh disposal after condoning the delay as sought for by the learned counsel for appellants.

7. Appeal was admittedly not filed within time. Though delay was only 68 days, the reason shown for condoning the delay was pendency of settlement talk between the parties, which was denied by respondent. The decree was passed by the trial court on 30.10.2003. First appellate court

found that for execution of the decree, respondent filed E.P on 16.9.2004 and delivery of the property was ordered on 9.12.2005. Even then, appeal was not filed immediately. Appeal was filed only on 20.12.2004. The copy of the judgment of the trial court establish that carbon copy of the judgment was received as early as 4.12.2003. The question is whether in such circumstance dismissal of the application for condonation on the ground that there is no satisfactory reason for non filing of the appeal within time. As rightly pointed out by first appellate court, when the only reason shown by appellants to condone the delay is the pendency of settlment talk between the parties and facts revealed would establish that there was no settlement talk and inspite of the decree for mandatory injunction and filing of execution petition in September, 2004, it cannot be believed that appellants did not file an appeal because of a settlement talk. In such circumstance, it cannot be said that dismissal of the application

for condonation of delay was unjustifiable.

8. Even on merits, I do not find that appellants are entitled to get any relief in the appeal. As rightly found by the trial court, Section 8(2) of Hindu Minority and Guardianship Act cannot apply to the execution of a partition deed whereunder properties obtained by three children of Gomathyamma were partitioned between the daughter and legal heirs of deceased son, the appellants herein, and mother Gomathyamma. Therefore appellants are not entitled to challenge Ext.A3 on the ground that they are minors at the time of execution of Ext.A3 or on the ground that no leave of the court was obtained for entering the partition deed. If that be so, Ext.A3 is binding on the appellants.

9. Under Ext.A3 plaint schedule property was allotted to the respondent. Hence respondent has title to the property. It was argued by learned counsel appearing for appellants that eventhough Ext.A3 provides for payment of Rs.20,000/- to the

appellants it was not paid and therefore respondent is not entitled to claim title under Ext.A3. Even if the argument of the learned counsel that respondent did not perform her obligation is accepted, remedy of appellants is to realise Rs.20,000/- due to them under Ext.A3 partition deed. They are not entitled to challenge the title of respondent obtained under Ext.A3. Therefore respondent is entitled to claim possession of the building, on the strength of the title.

10. Learned counsel appearing for appellants also argued that under section 23 of Hindu Succession Act, first appellant and appellants 2 and 4 being the female children of first appellant have a right of residence in the building which was the dwelling house separated under Ext.A3 and therefore respondent is not entitled to a decree for mandatory injunction. The argument based on Section 23 advanced by the learned counsel cannot also be accepted. Section 23 provides that where a Hindu intestate has left surviving him or her both

male and female heirs specified in Class I of the Schedule and his or her property includes a dwelling house wholly occupied by members of his or her family, then, notwithstanding anything contained in the Act, the right of any such female heir to claim partition of the dwelling house shall not arise until the male heirs choose to divide their respective shares therein, but the female heir shall be entitled to a right of residence therein. What is provided under section 23 is that when a property which is left behind by a Hindu intestate is to be divided between male and female heirs as provided under Schedule I, and the property so divided includes a dwelling house wholly occupied by members of his or her family, then a female heir is not entitled to seek partition unless the male heir choose to divide the property. It has no application in a case where the property has already been divided as in the instant case. Moreover, because of the repealing of section 23, by Amendment Act 39 of

2005, appellants are not entitled to advance the plea based on Section 23. In such circumstance, I find no substantial question of law involved in the appeal.

The appeal is dismissed.

Learned counsel appearing for appellants then submitted that a reasonable time may be granted to the appellants to surrender vacant possession of the building. Appellants are granted three months time to surrender vacant possession of the building.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006